

APR 30 1996

No. 95-891

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF OHIO, PETITIONER

v.

ROBERT D. ROBINETTE

*ON WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT*

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III  
*Solicitor General*

JOHN C. KEENEY  
*Acting Assistant Attorney  
General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

PAUL A. ENGELMAYER  
*Assistant to the Solicitor  
General*

JOSEPH C. WYDERKO  
*Attorney*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

**QUESTION PRESENTED**

Whether the Fourth Amendment categorically requires a police officer who has validly stopped a motorist for a traffic violation to inform the motorist that he is free to leave before any questioning of the motorist about matters unrelated to the original traffic stop may be found to be consensual.

## TABLE OF CONTENTS

	Page
Interest of the United States .....	1
Statement .....	2
Summary of argument .....	10
Argument:	
The point at which a motorist who has been subject to a traffic stop would feel free to leave turns on all facts and circumstances surrounding the encounter, not solely on whether a police officer has advised the motorist that he is free to leave .....	13
A. The totality of the circumstances governs determinations of when a Fourth Amendment seizure has begun and when the seizure has ended .....	14
B. At the time that respondent was asked whether he would consent to the search of his car, a reasonable person would have understood that he was free to leave .....	24
Conclusion .....	26

## TABLE OF AUTHORITIES

Cases:	
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984) .....	22, 23
<i>California v. Hodari D.</i> , 499 U.S. 621 (1991) ..	14, 16, 25
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979) .....	13, 14
<i>Florida v. Bostick</i> , 501 U.S. 429 (1991) ...	9, 10, 11, 15,
	16, 17, 23, 25, 26
<i>Florida v. Rodriguez</i> , 469 U.S. 1 (1984) .....	16
<i>Florida v. Royer</i> , 460 U.S. 491 (1983) ...	10, 15, 16, 17, 24
<i>Horton v. California</i> , 496 U.S. 128 (1990) .....	23
<i>INS v. Delgado</i> , 466 U.S. 210 (1984) .....	16, 17, 21
<i>Maryland v. Macon</i> , 472 U.S. 463 (1985) .....	23
<i>Michigan v. Chesternut</i> , 486 U.S. 567 (1988) ..	12, 15, 16,
	17, 22, 23

Cases—Continued:	Page
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) .....	23
<i>New York v. Class</i> , 475 U.S. 106 (1986) .....	13
<i>Ohio v. Johnson</i> , 467 U.S. 493 (1984) .....	8
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980) .....	8
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106 (1977) .....	13
<i>Reid v. Georgia</i> , 448 U.S. 438 (1980) .....	13
<i>Reynoldsville Casket Co. v. Hyde</i> , 115 S. Ct. 1745 (1995) .....	8
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973) ..	9, 20, 21
<i>Scott v. United States</i> , 436 U.S. 128 (1978) .....	23
<i>South Dakota v. Opperman</i> , 428 U.S. 364 (1976) ....	14
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968) .....	10, 13, 15, 16
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975) .....	13
<i>United States v. Cortez</i> , 449 U.S. 411 (1981) .....	13
<i>United States v. Hensley</i> , 469 U.S. 221 (1985) .....	13
<i>United States v. Lee</i> , 73 F.3d 1034 (10th Cir. 1996) .....	19
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)..	15, 16, 21, 25, 26
<i>United States v. Rivera</i> , 906 F.2d 319 (7th Cir. 1990) .....	19
<i>United States v. Robinson</i> , 414 U.S. 218 (1973) .....	13
<i>United States v. Rodriguez</i> , 69 F.3d 136 (7th Cir. 1995) .....	19
<i>United States v. Sandoval</i> , 29 F.3d 537 (10th Cir. 1994) .....	18
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985) .....	13
<i>United States v. Sokolow</i> , 490 U.S. 1 (1989) .....	13, 16
<i>United States v. Turner</i> , 928 F.2d 956 (10th Cir.), cert. denied, 502 U.S. 881 (1991) .....	18
<i>United States v. Watson</i> , 423 U.S. 411 (1976) .....	21
<i>United States v. Werking</i> , 915 F.2d 1404 (10th Cir. 1990) .....	18

Constitution and statute:	Page
U.S. Const. Amend. IV .....	1, 8, 10, 11, 13, 14, 17, 19, 23
Ohio Rev. Code Ann. § 2925.11(A) (Anderson 1993) ...	3

In the Supreme Court of the United States

OCTOBER TERM, 1995

---

No. 95-891

STATE OF OHIO, PETITIONER

v.

ROBERT D. ROBINETTE

---

*ON WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

---

**INTEREST OF THE UNITED STATES**

This case presents the question whether the Fourth Amendment categorically requires a police officer who has validly stopped a motorist for a traffic violation to inform the motorist that he is free to leave before any questioning of the motorist about matters unrelated to the original traffic stop may be found to be consensual. The Court's analysis and resolution of that question is likely to affect the admissibility of evidence in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

## STATEMENT

1. On August 3, 1992, Deputy Sheriff Roger Newsome stopped respondent on Interstate Highway 70 in Montgomery County, Ohio, for driving 69 miles per hour through a construction zone that had a speed limit of 45 miles per hour. In order not to slow traffic unduly, Deputy Newsome's practice was to issue an oral warning, rather than a citation, to motorists speeding in the construction zone. Deputy Newsome also was a member of a highway drug interdiction program. As part of that program, he routinely asked permission to search the cars that he stopped for speeding violations. Pet. App. 2-3; Suppression Hearing Tr. 6-7, 14-17, 19.

When the deputy approached the stopped car, respondent was in the driver's seat and another individual was in the front passenger seat. Deputy Newsome asked respondent for his driver's license, and respondent gave it to the deputy. Deputy Newsome took the driver's license to his cruiser. After determining that respondent had no outstanding violations, the deputy returned to respondent's car. Deputy Newsome asked respondent to get out of the car and to step to the rear of the vehicle. Respondent did so. While respondent stood between his car and the deputy's cruiser, the deputy returned to his cruiser and turned on the cruiser's video camera. Pet. App. 2; Suppression Hearing Tr. 7-9, 12-14, 21-22.

When the video camera was activated, Deputy Newsome returned to respondent. He orally warned respondent about the speeding violation and handed the driver's license back to respondent. Deputy Newsome then asked: "One question before you get gone [sic]; are you carrying any illegal contraband in

your car? Any weapons of any kind, drugs, anything like that?" Respondent answered "no." The deputy asked whether all the luggage in the car belonged to respondent and his passenger, and respondent replied that it did. Deputy Newsome then asked for permission to search the car. Respondent consented to the search. As a safety precaution, the deputy asked respondent and the passenger to stand in front of the car while he searched it. Pet. App. 2-3; Suppression Hearing Tr. 7-9, 15-17, 22-31.

Deputy Newsome found a small amount of marijuana in the car's console. Before continuing the search, the deputy placed respondent and the passenger in the back seat of his cruiser. When he resumed searching the car, Deputy Newsome found a methylene dioxy methamphetamine (MDMA) pill in a clear plastic film container. Deputy Newsome then placed respondent under arrest. Pet. App. 3; Suppression Hearing Tr. 10-11, 17-20. Based on his possession of the MDMA pill, respondent was indicted for drug abuse, in violation of Ohio Rev. Code Ann. § 2925.11(A) (Anderson 1993). Pet. App. 3.

2. Respondent filed a motion to suppress the evidence found during the search of his car. At the suppression hearing, respondent testified that he felt that he was free to leave after the deputy gave him the oral warning about the speeding violation and returned his driver's license to him. Suppression Hearing Tr. 23, 27.<sup>1</sup> He also testified that he was

<sup>1</sup> On direct examination, respondent testified (Suppression Hearing Tr. 23):

Q. And did [the deputy] indicate to you at that time that he was giving you a warning and that you were free to go?

"sort of shocked" when the deputy requested permission to search the car, "automatically" answered "yes," and felt that he could not refuse the deputy's request. Pet. App. 3; Suppression Hearing Tr. 24, 29. Respondent further testified that he had been stopped for speeding in the past and that he had a bachelor of science degree in botany. *Id.* at 30-31.

3. The trial court denied the motion to suppress. Pet. App. 24-26. The pertinent question, it stated, "is the validity of the consent given by [respondent]."

A. Yes, he did.

Q. And then at that time, I think, as the tape will reflect, the officer asked you some questions about did you have any weapons of any kind, drugs, anything like that. Do you recall that question?

A. Yes.

Q. What was running through your head at that time?

A. Uhm, surprised. I didn't know what—where he was coming from or what was going on or why he was asking me the question.

Q. Did you in fact feel you were free to leave at that point?

A. I thought I was.

Q. And did you attempt to leave at that point?

A. Uhm, I was beginning to. Yes.

On cross-examination, respondent similarly testified (*id.* at 27):

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A. Yes.

*Id.* at 25. In resolving that question, the court was "greatly aided by [the] video tape of the encounter." *Ibid.* Ordinarily, the court explained, the fact that respondent had been in custody during the traffic stop would be "of great significance" to the determination whether his ensuing consent was valid. *Ibid.* Based on the videotape, however, the court noted that, before asking about the presence of contraband and seeking consent to search, the officer had "made it clear to [respondent] that the traffic matter was concluded." *Ibid.* The court also rejected respondent's claim that his consent necessarily had been invalid because he had been unaware of his right to refuse the request for consent to search his car. Rather, the court found that "[t]he manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer." *Ibid.* The court held that those circumstances, "coupled with [respondent's] education and intelligence[,] cause this court to find that [respondent's] consent was valid and not the product of duress or coercion." *Id.* at 25-26. Respondent thereupon entered a no-contest plea and was found guilty. *Id.* at 17.

4. The district court of appeals reversed. Pet. App. 15-23. It held that "a reasonable person in [respondent's] position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long as the police officer was continuing to ask investigative questions." *Id.* at 17-18. Moreover, the court held, "once a police officer has issued a traffic citation or warning for a speeding violation, it is unreasonable to detain the motorist further for the purpose of obtaining consent to search for drugs or alcohol, absent a reasonable and articulable suspicion that the motorist is transporting either drugs or

alcohol." *Id.* at 18. "Because the search \* \* \* resulted from an unlawful detention," the court concluded, "the fact that [respondent], during the unlawful detention, may have consented to the search is immaterial." *Ibid.*

Judge Wolff dissented. Pet. App. 18-22. He argued that, at the time that respondent consented to the search, a reasonable person in respondent's position would have believed "that the investigative stop had been concluded, and that he or she was free to go." *Id.* at 20. He noted that respondent had a college degree and had testified that, after receiving his driver's license from the deputy, he had felt free to leave. *Id.* at 22. Judge Wolff thus agreed with the trial court that respondent was not "detained" when he consented to the search of the car. Whether a detention has come to an end, Judge Wolff stated, should be determined "on a case-by-case basis." *Ibid.*

5. The Ohio Supreme Court affirmed. Pet. App. 1-14. The four-justice majority held that the search of respondent's car "was invalid since it was the product of an unlawful seizure." *Id.* at 4. The court explained that, while the decision to stop respondent for speeding had been justified, once Deputy Newsome returned to respondent's car after checking his license, "every aspect of the speeding violation had been investigated and resolved." *Id.* at 6. And, the court held, "[w]hen the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure." *Ibid.* In

this case, the court held, the officer asked respondent to exit his car solely for the purpose of questioning him about matters unrelated to the speeding violation and regarding which there was neither probable cause nor reasonable suspicion to believe that a crime had been committed. *Id.* at 6-7. Thus, "the detention of [respondent] ceased being legal when Newsome asked him to leave his vehicle." *Id.* at 7. And, because respondent's consent to search "clearly was the result of his illegal detention, and was not the result of an act of will on his part," that consent was invalid. *Ibid.*

In so holding, the Ohio Supreme Court emphasized that it was adopting "a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation." Pet. App. 4; see *id.* at 8. The court explained (*id.* at 8-9):

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.

\* \* \* \* \*

Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citi-

zens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Because “[a] ‘consensual encounter’ immediately following a detention is likely to be imbued with the authoritative aura of the detention,” the court held, “citizens stopped for traffic offenses [must] be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation.” *Id.* at 9. “Any attempt at consensual interrogation,” the court stated, “must be preceded by the phrase ‘At this time you legally are free to go’ or by words of similar import.” *Ibid.*<sup>2</sup>

Justice Sweeney, joined by two other justices, dissented. Pet. App. 10-14. He argued that the “unique” bright-line test adopted by the majority was “contrary to well-established state and federal constitutional law” and “vastly undercuts our law enforcement’s ability to ferret out crime.” *Id.* at 10. Justice Sweeney noted that “the crucial test” in determining whether a citizen’s encounter with a police officer is consensual or is a Fourth Amendment seizure “has always been ‘whether, taking into account all of the circumstances surrounding the encounter, the police conduct “would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”’” *Id.* at 10-11

---

<sup>2</sup> That principle is made clear in the syllabus of the Ohio Supreme Court’s decision, see Pet. App. 1, which constitutes “the authoritative basis for its decision.” *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1748 (1995); *Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984); *Ohio v. Roberts*, 448 U.S. 56, 61 n.3 (1980).

(quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). Contrary to the majority’s bright-line rule, Justice Sweeney observed, “being informed of the right to refuse a search is but one factor to be taken into account when determining whether consent was freely given; it is not the ‘*sine qua non* of an effective consent.’” *Id.* at 12 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). And, he noted, there is no basis for departing from that approach in determining whether a person must be informed of the right to leave the scene of a detention. *Ibid.* Thus, “[w]hether the police officer uttered a warning is a relevant consideration, but it does not end the inquiry.” *Ibid.*

Applying the totality-of-the-circumstances test, Justice Sweeney concluded that the encounter between respondent and the police officer became “an ordinary consensual encounter” after the officer had returned respondent’s driver’s license. Pet. App. 12. He argued that “[respondent’s] consent should not be invalidated solely because it followed a traffic stop and simply because the police officer failed to warn [respondent] that he was free to go.” *Ibid.* Rather, “[t]he utterance of these ‘magic words’ is but one factor for the fact-finder to consider when making the determination as to whether consent was voluntarily given.” *Id.* at 12-13. Justice Sweeney noted that “[t]h[e] technique of requesting consent following an initial valid detention is employed on a daily basis throughout this nation to interdict the flow of drugs,” and when the police inquiry is itself not coercive, a citizen’s consent should not be invalidated. *Id.* at 14.

### SUMMARY OF ARGUMENT

The fundamental requirement of the Fourth Amendment is that searches and seizures be reasonable. As this Court has long recognized, however, "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). Where an individual is not seized, an officer is generally free to ask questions of him, to ask to examine his identification, and to request consent to search his property, provided, of course, that in doing so the officer does not "convey a message that compliance with [his] requests is required." *Bostick*, 501 U.S. at 435; *id.* at 437; *Florida v. Royer*, 460 U.S. 491, 498 (1983) (opinion of White, J.) ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.").

Respondent was unquestionably "seized" within the meaning of the Fourth Amendment when Deputy Newsome stopped his automobile for speeding. The decisive question in this case is whether respondent was still seized as of the moment when Deputy Newsome, having issued respondent a warning for the traffic offense and returned his driver's license, requested and received respondent's consent to search the car. The Ohio Supreme Court held that respondent was still seized at that point. And, because the court held that Deputy Newsome lacked justification to extend the seizure to pose questions unrelated to the purpose of the traffic stop, it ruled that respon-

dent's consent had been the product of an unlawful detention and hence violated the Fourth Amendment.

A. In holding that respondent was still seized at that point, the Ohio Supreme Court erred. The court based that holding on a new "bright-line test" (Pet. App. 4, 8) under which a seizure of a motorist invariably persists until an officer instructs the motorist that "[a]t this time you legally are free to go" or [uses] words of similar import" (*id.* at 9). This Court, however, has consistently held that whether a person has been seized turns on "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (internal quotation marks omitted). The Court has accordingly rejected *per se* rules that determine, as a categorical matter, whether an individual has been seized.

An inquiry into the totality of the circumstances of an encounter is similarly appropriate to determine whether a seizure, once begun, has terminated. In holding that an encounter between an officer and a motorist following a traffic stop invariably constitutes a seizure until the motorist is told he is free to go, the Ohio Supreme Court relied on the fact that "[t]he transition between detention and a consensual exchange" (Pet. App. 8) may be difficult for a civilian to discern. The same, however, is true of the reverse situation in which an initially consensual encounter develops into a seizure. Yet this Court has never held that citizens are entitled to be notified before, or at the time when, such a Fourth Amendment event has commenced. Indeed, the requirement of mandatory police notification imposed by the Ohio Supreme

Court conflicts with this Court's consistent refusal to mandate prophylactic warnings to citizens in other areas of interaction with police.

Also unpersuasive as a basis for a "bright-line test" is the possibility that a consensual conversation that follows a detention will "be imbued with the authoritative aura of the detention." Pet. App. 9. In particular cases, that factor may prove significant in determining whether an individual continued to be seized at a particular point. The totality of the circumstances test, however, fully accommodates consideration of that factor, because, as this Court has emphasized, that test takes into account "not only \* \* \* the particular police conduct at issue, but also \* \* \* the setting in which the conduct occurs." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). While an officer's statements to the motorist are relevant to the determination whether a reasonable person would feel free to terminate his encounter with the police, talismanic reliance on whether an officer has expressly advised a motorist that detention has ended ignores the fact that other circumstances may also convey to the motorist that he is free to do so. Those factors may include the fact that the officer has returned the driver's license and registration, the officer's manner and phrasing of inquiry, and the position of the parties.

B. As the trial court held after reviewing the videotape of the encounter in this case, those factors demonstrate that, at the time the officer asked respondent whether he would consent to a search of his car, a reasonable person would have understood that he was free to terminate the encounter. Among other things, Deputy Newsome had returned respondent's license, had completed the business of the traffic stop by

giving respondent a warning, did not demand that respondent answer his several questions, and did not engage in any show of authority. It was therefore lawful for Deputy Newsome to ask respondent for permission to search the car, and respondent's consent to that request was not the product of a Fourth Amendment seizure.

#### **ARGUMENT**

##### **THE POINT AT WHICH A MOTORIST WHO HAS BEEN SUBJECT TO A TRAFFIC STOP WOULD FEEL FREE TO LEAVE TURNS ON ALL FACTS AND CIRCUMSTANCES SURROUNDING THE ENCOUNTER, NOT SOLELY ON WHETHER A POLICE OFFICER HAS ADVISED THE MOTORIST THAT HE IS FREE TO LEAVE**

A traffic stop may lawfully be initiated based on an officer's reasonable belief that a motorist may be in violation of the traffic laws.<sup>3</sup> The Ohio Supreme

---

<sup>3</sup> Such a traffic stop may be initiated upon a showing of reasonable suspicion, based on specific and articulable facts, to believe that an offense has been committed. See, e.g., *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *United States v. Hensley*, 469 U.S. 221, 226 (1985); *United States v. Cortez*, 449 U.S. 411, 417-418 (1981); *Delaware v. Prouse*, 440 U.S. 648, 653-654, 663 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-884 (1975); see also *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam); *Terry v. Ohio*, 392 U.S. 1 (1968). Where an officer has observed a traffic violation, the higher standard of probable cause is met. See, e.g., *New York v. Class*, 475 U.S. 106, 117-118 (1986) (stop of car for speeding and cracked windshield); *id.* at 125 (Brennan, J., concurring in part and dissenting in part); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam) (stop of car bearing expired license tags); *United States v. Robinson*, 414 U.S. 218, 220-221 (1973) (stop of car for driving

Court did not dispute that after completion of the stop (including questioning reasonably related to its justifications) a motorist may validly consent to additional police questioning, or to a search of his vehicle, provided that the encounter is consensual.<sup>4</sup> It held, however, that the Fourth Amendment imposes a bright-line rule that no such encounter may be deemed consensual unless the officer first informs the motorist, in specific terms, that he is free to leave. In our view, the court erred in adopting such a *per se* rule. Just as the question whether a seizure has begun is determined by examining the totality of the circumstances, so also is the question whether a seizure has ended.

**A. The Totality Of The Circumstances Governs Determinations Of When A Fourth Amendment Seizure Has Begun And When The Seizure Has Ended**

1. As the Court has explained, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California v. Hodari D.*, 499 U.S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment

---

without a license); see also *Prouse*, 440 U.S. at 659; *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

<sup>4</sup> Petitioner has not presented the question whether it is reasonable briefly to extend a traffic stop whose business has otherwise been completed to ask a motorist, as did Deputy Newsome, whether he is carrying illegal drugs or firearms and whether he would consent to a search of the car. Nor does this case present the question whether it is reasonable to ask such questions during a traffic stop whose business is ongoing.

scrutiny unless it loses its consensual nature." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Accordingly, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Ibid.* (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983) (opinion of White, J.)). See *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.) (there is "nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets") (quoting *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring)).

This Court has addressed a number of situations requiring a determination whether—and, if so, when—a defendant has been seized during a discussion with law enforcement officers. The test that it has developed to distinguish seizures from consensual encounters is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.)). A seizure thus occurs at the point that a reasonable person would think that he was not free to terminate a conversation and go about his business. Circumstances that "might indicate a seizure \* \* \* [include] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

*Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.); see *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (where DEA agents “grabbed [suspect] by the arm and moved him back onto the sidewalk,” Court assumed that a seizure had occurred); *Terry*, 392 U.S. at 19 (where officer “took hold of [suspect] and patted down the outer surfaces of his clothing,” seizure occurred). But, “[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person.” *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.); see also *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam).

In applying the test of whether a reasonable person would feel free to leave, this Court has repeatedly emphasized the need to examine all of the facts and circumstances surrounding a citizen’s interaction with police. See, e.g., *Bostick*, 501 U.S. at 436-437; *Hodari D.*, 499 U.S. at 627-628; *Chesternut*, 486 U.S. at 573-574; *Rodriguez*, 469 U.S. at 5-6; *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Royer*, 460 U.S. at 502 (opinion of White, J.); *id.* at 514 (Blackmun, J., dissenting); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.). In so doing, the Court has rejected *per se* rules that would purport categorically to determine whether a citizen had been seized. In *Bostick*, for example, the Court rejected the claim that police questioning aboard a bus necessarily constitutes a seizure. The Florida Supreme Court had held that, because such questioning occurs in “cramped confines” where the presence of police is unusually intimidating, and because a passenger who wishes to avoid police is necessarily forced to divert from his travel schedule, questioning by drug-interdiction

police invariably constitutes a seizure requiring Fourth Amendment justification. 501 U.S. at 435.

This Court, however, held that the correct inquiry is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” *Bostick*, 501 U.S. at 436. That inquiry, the Court held, is made “taking into account all of the circumstances surrounding the encounter.” *Id.* at 437 (quoting *Chesternut*, 486 U.S. at 569). And while “[w]here the encounter takes place is one factor, \* \* \* it is not the only one.” *Ibid.*; see also *id.* at 439. Thus, the Court held (*id.* at 439-440):

[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.

Similarly, in *Chesternut*, the Court rejected a “bright-line rule” adopted by the Michigan Supreme Court that any “investigatory pursuit” of a motorist constitutes a Fourth Amendment seizure. 486 U.S. at 572. Instead, the Court held, “any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account ‘all of the circumstances surrounding the incident’ in each individual case.” *Ibid.* (quoting *Delgado*, 466 U.S. at 215). See *Royer*, 460 U.S. at 506-507 (opinion of White, J.) (there is no “litmus-paper test for distinguishing a consensual encounter from a seizure,” as

"there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers").

2. The Ohio Supreme Court adopted a bright-line test requiring that no questioning following a traffic stop may be found consensual unless the officer has expressly informed the motorist that he is free to leave. As the lower federal courts have consistently held, however, the determination of the point at which a seizure has concluded should instead be made in light of the totality of the circumstances of the encounter between the citizen and the police. The content and manner of any statements that an officer makes to or in the presence of the motorist have an important bearing upon whether a reasonable motorist would believe that he was free to leave.<sup>5</sup> Other factors, however, may also bear decisively on that issue. Those factors include whether the officer has returned the motorist's identification documents; whether the officer has completed the business of the traffic stop by issuing a summons or giving a warning to the motorist; whether the officer displays accoutrements of authority; and the officer's statements, tone, position, and manner towards the motorist.<sup>6</sup>

---

<sup>5</sup> See, e.g., *United States v. Sandoval*, 29 F.3d 537, 540-542 (10th Cir. 1994) (finding that seizure persisted where motorist asked, "That's it?", and officer responded, "No, wait a minute").

<sup>6</sup> See, e.g., *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.) (encounter between motorist and officer who had made traffic stop became consensual after officer returned license and registration and made no "coercive show of authority"), cert. denied, 502 U.S. 881 (1991); *United States v. Werking*, 915 F.2d 1404, 1408-1409 (10th Cir. 1990) (encounter between

In holding that, regardless of the other circumstances of the encounter, an encounter between an officer and a motorist following a traffic stop invariably constitutes a seizure until an officer expressly advises the motorist that he is free to leave, the Ohio Supreme Court relied on two considerations. First, the court stated, absent express notification to the motorist that the seizure has concluded, "[t]he transition between detention and a consensual exchange can be so seamless that the untrained eye [of a motorist] may not notice that it has occurred." Pet. App. 8. The same, however, is true of the familiar reverse situation in which a police-citizen encounter that began consensually develops into a Fourth Amendment seizure. Yet this Court has never held that citizens are entitled to be notified by the officer whether, and when, such a Fourth Amendment event has commenced.

On the contrary, the Ohio Supreme Court's requirement that a motorist be admonished that he is

---

motorist and officer who had made traffic stop "became an ordinary consensual encounter" after officer returned driver's license and thereafter did not make an "overbearing show of authority"); *United States v. Rivera*, 906 F.2d 319, 322-323 (7th Cir. 1990) (traffic-stop seizure had concluded and become a consensual encounter once trooper wrote warning, returned identification documents, and told motorist "that was it"); see also *United States v. Lee*, 73 F.3d 1034, 1040 (10th Cir. 1996) (seizure held to continue where, as of point that officer requested consent to search car, officer still held onto license and registration papers); cf. *United States v. Rodriguez*, 69 F.3d 136, 141-142 (7th Cir. 1995) (in context of encounter with airport traveler, mere voluntary production of travel documents does not constitute a seizure, although "the lengthy retention of documents such as identification and airline tickets is a factor in determining whether a stop has occurred").

free to leave conflicts with this Court's consistent refusal to mandate prophylactic warnings to citizens in other areas of interaction with police. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), for example, the Court held that whether an individual's "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. The Court thus rejected a proposed *per se* rule that the government establish that the individual knew that he has the right to refuse consent: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Ibid.* The Court stated (*id.* at 231-232) that lower courts had rightly repudiated the approach of requiring a subject of a search to be advised of his right to refuse to give consent:

[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if

he chooses, a defendant is informed of his trial rights. Cf. *Boykin v. Alabama*, 395 U.S. 238, 243 [(1969)]. And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda v. Arizona*, [384 U.S. 436 (1966)], we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

Similarly, in *Delgado*, the Court rejected the notion that, before posing questions to a citizen, an officer should advise the citizen of his right not to respond. "While most citizens will respond to a police request," the Court noted, "the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." 466 U.S. at 216 (citing *Schneckloth, supra*). See *United States v. Watson*, 423 U.S. 411, 424 (1976) ("[T]he absence of proof that [the defendant] knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance."); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.) (conclusion that police did not seize airport traveler "is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed") (citing *Schneckloth, supra*).

The Ohio Supreme Court also based its "bright-line rule" on the "likel[ihood]" that a consensual encounter that immediately follows a traffic stop will "be imbued with the authoritative aura of the detention." Pet. App. 9. The court explained that "[m]ost people believe that they are validly in a police officer's

custody as long as the officer continues to interrogate them." *Ibid.* That factor does not, however, justify a categorical requirement of formal notification of the right to leave. Rather, it commands giving weight, in the inquiry into whether a reasonable person would have believed at a particular point that he was free to leave, to the fact that an encounter had its roots in a nonconsensual stop. The traditional inquiry into "the coercive effect of police conduct, taken as a whole," *Chesternut*, 486 U.S. at 573, accommodates consideration of that factor, because, as this Court has explained, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs," *ibid.* Thus, "the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings." *Id.* at 574. Where other factors would make clear to a reasonable motorist that he is free to leave, there is no reason to deem the encounter a continuing seizure solely because the officer has not expressly articulated that fact.

Finally, while the Ohio Supreme Court confined its "bright-line" requirement that there be an explicit notification that a seizure has concluded to the context of interrogations of motorists following traffic stops (Pet. App. 4, 9), the arguments it advanced do not logically limit themselves to that context. Instead, taken to its logical extreme, the court's approach would oblige officers to make similar declarations at the close of brief investigative detentions in the manifold contexts in which they daily occur—including streets, airports, bus and train stations, and public conveyances. See *Berkemer v. McCarty*, 468

U.S. 420, 439-440 (1984) (noting that the "comparatively nonthreatening character" of traffic stops relative to formal arrests makes such stops akin to *Terry* stops, and holding that the arrest-context requirement of *Miranda* warnings thus does not apply to roadside questioning of a motorist).<sup>7</sup> There is no justification for abandoning the long-standing totality-of-the-circumstances test to impose such a burdensome and mechanical requirement of formal notification upon law enforcement officers.<sup>8</sup>

---

<sup>7</sup> The Court in *Berkemer* noted that "[t]wo features of an ordinary traffic stop mitigate the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely'" (468 U.S. at 437 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966))) and make roadside questioning analogous to a *Terry* stop (*id.* at 439). First, "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief." *Id.* at 437. Second, the "circumstances associated with the typical traffic stop," including its exposure to public view, "are not such that the motorist feels completely at the mercy of the police." *Id.* at 438.

<sup>8</sup> The Ohio Supreme Court also appeared to base its holding that respondent was seized on its perception that, in continuing to question respondent after the business of the traffic stop had been completed, Deputy Newsome acted out of a "motivation" unrelated to "the purpose of the original, constitutional stop." Pet. App. 6. To the extent that the court's analysis turned on the officer's subjective motivations, it was in error. As this Court has held repeatedly, the reasonableness of police conduct under the Fourth Amendment turns solely "on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Maryland v. Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978); *Horton v. California*, 496 U.S. 128, 138 (1990); see also *Bostick*, 501 U.S. at 439; *Chesternut*, 486 U.S. at 574. Compare *Whren v. United States*, No. 95-5841 (argued April 17, 1996) (presenting question whether motorist may challenge reasonableness of traffic stop based on probable

**B. At The Time That Respondent Was Asked Whether He Would Consent To The Search Of His Car, A Reasonable Person Would Have Understood That He Was Free To Leave**

Under the totality-of-the-circumstances test, it is clear, as the trial court held (Pet. App. 24-26) that, at the point that Deputy Newsome requested consent to search respondent's car, a reasonable person in respondent's situation would have understood that he was free to leave. By that point, Deputy Newsome had returned respondent's driver's license. He had also completed the business of the traffic stop, having orally warned respondent about the speeding violation while giving no indication that any further enforcement action would be taken. Compare cases cited at note 6, *supra*; *Royer*, 460 U.S. at 504 n.9 (opinion of White, J.) ("Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them."); *id.* at 504; *id.* at 508 (Powell, J., concurring).

Nothing about the questions that the deputy put to respondent after returning the license conveyed that respondent was obliged to answer. Indeed, the deputy indicated to respondent that even his questioning would shortly cease. See Pet. App. 2-3 ("One question before you get gone [sic]; are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"). Deputy Newsome also did not demand that respondent assent to a search of the car, but instead "requested permission" to do so.

---

cause based on claim that officer acted out of "pretextual" motives).

*Id.* at 24. Finally, as the trial court found (*id.* at 25), the videotape of the episode belied any suggestion that respondent's consent was "the product of duress or coercion." Rather, "[t]he manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer." *Ibid.* Compare *Hodari D.*, 499 U.S. at 625 (no seizure where suspect was subject to neither application of physical force nor show of authority); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.); see also *Bostick*, 501 U.S. at 434 (noting that Court has "held repeatedly that mere police questioning does not constitute a seizure"). Indeed, while the pertinent inquiry is whether a reasonable person, not the particular motorist, would have felt free to leave in light of all of the circumstances, respondent himself acknowledged that, after the deputy returned the driver's license, he felt that he was "free to leave." Suppression Hearing Tr. 23, 27.

Under those circumstances, a finding that a reasonable person would not have felt free to leave would necessarily be based solely on the fact that the deputy's questions and request for consent to search followed a traffic stop and were not preceded by an express statement that respondent was free to leave. See Pet. App. 12 (Sweeney, J., dissenting). As we have explained, the absence of such a statement—while germane to the issue whether a person, once seized, continues to be seized—does not alone establish an ongoing seizure. Nor does the fact that respondent consented to the search, despite his knowledge that his car possessed illegal drugs, suggest that his

consent was the product of coercive police conduct.<sup>9</sup> Accordingly, the conclusion of the Ohio Supreme Court that respondent remained seized at the time of the deputy's questions should be reversed.

### **CONCLUSION**

The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted.

DREW S. DAYS, III  
*Solicitor General*

JOHN C. KEENEY  
*Acting Assistant Attorney  
General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

PAUL A. ENGELMAYER  
*Assistant to the Solicitor  
General*

JOSEPH C. WYDERKO  
*Attorney*

APRIL 1996

---

<sup>9</sup> See *Bostick*, 501 U.S. at 437-438 (rejecting seizure argument based on claim that no reasonable person "would freely consent to a search of luggage that he or she knows contains drugs" and noting that "the 'reasonable person' test presupposes an *innocent* person"); *Mendenhall*, 446 U.S. at 555 (opinion of Stewart, J.) ("We \* \* \* reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions.").